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No. 80-419

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF ARIZONA, PETITIONER

v.

MARICOPA COUNTY MEDICAL SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an agreement among competing physicians setting the maximum prices they will charge insurance companies for services provided to insured patients is illegal per se under Section 1 of the Sherman Act.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Maricopa Medical Foundation for Medical Care and Pima Foundation for Medical Care are associations of doctors that approve and administer health insurance plans underwritten by private insurers (Pet. App. 2-3, 39). Membership in the foundations is open to all physicians licensed in Arizona (*id.* at 3). More than 70% of the practicing physicians in each of Maricopa and Pima counties are members of the respective foundations (CR 106, Exhibit E at 1292; CR 7(a), PF 125).[1] The foundations set the maximum amounts that insurers must pay to physicians who provide services to patients enrolled in insurance plans approved by the foundations (Pet. App. 2-3, 39, 42). Members of the foundations agree to accept the insurance payments as full compensation for their services, *i.e.*, they agree not to seek additional payments from their patients (*id.* at 42-43).[2] Insurers wishing to obtain foundation approval for their plans must agree to pay mem-

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[1] "CR" refers to the clerk's record in the court of appeals.

[2] Persons insured under foundation-approved plans may obtain services from nonmember physicians (Br. in Opp. 6). Such nonmember physicians are paid by insurers for charges up to the foundation maximum, but they need not accept this amount in full satisfaction of their charges and may bill patients for the balance of any fee (*ibid.*).

ber physicians for services to insured patients up to the maximums established by the foundations (Pet. App. 43).[3]

2. In 1978 the State of Arizona brought suit in the United States District Court for the District of Arizona seeking injunctive relief against the two foundations, the Maricopa County Medical Society, and the Pima County Medical Society.[4] The complaint alleged that the maximum price agreements constituted price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Arizona moved for summary judgment on the ground that such agreements are illegal per se. The defendants admitted that the foundations, by vote of their member physicians, set the maximum prices to be paid by insurers for services provided to insured patients (Pet. App. 39; CR 54, ¶ 2). While the defendants argued that the foundation plans were procompetitive because they provided an alternative type of health care coverage and that use of a maximum fee was effective in containing health care costs, they did not assert that either of those objectives required that participating doctors set maximum fees.

The district court denied Arizona's motion for summary judgment on the issue of liability (Pet.

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[3] In addition to setting maximum fees, the foundations perform two other functions in conjunction with approved insurance plans: (1) peer review, *i.e.*, evaluation of the necessity and appropriateness of treatment and hospital services rendered to insured patients, and (2) insurance administration, *i.e.*, serving as agents for underwriters and drawing funds from insurers' accounts to pay doctors' bills (Pet. App. 3). Respondents have not asserted that performance of these functions requires that doctors agree on prices.

[4] The Pima County Medical Society was later dismissed under a consent order (Pet. App. 2 n.2).

App. 48). Although it noted that "[p]rice fixing has for some time been viewed as per se unlawful" (Pet. App. 43), the court refused to apply a per se rule to the conduct at issue for two reasons. First, it perceived "a recent antitrust trend [that] appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law" (*id.* at 43-44). Second, it considered the per se rule inapplicable because members of a profession were involved in the allegedly illegal conduct (*id.* at 45-47). The district court nonetheless certified to the court of appeals the question whether the rule of reason should be used in analyzing the foundations' price fixing activities (*id.* at 50-51).

On appeal, the defendants argued that a rule of reason analysis was required because the "antitrust laws were not intended to straightjacket imaginative experimentation in fields, such as the professions, not traditionally subject to antitrust scrutiny" (Brief of Defendant-Appellee Maricopa Foundation for Medical Care at 36). They also sought (*id.* at 38-39) to justify the rule of reason approach under the Ninth Circuit's decision in *Catalano, Inc.* v. *Target Sales, Inc.*, 605 F.2d 1097 (1979), rev'd and remanded, 446 U.S. 643 (1980). The defendants further argued that the challenged price agreements would not necessarily affect the fees charged to patients, and they asserted that there was no evidence of any coercion to force adherence in patient billing to maximum reimbursement levels. Finally, while the defendants cited this Court's decision in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), they did not contend that price agreements among competing doctors are necessary to achieve any procompetitive purpose of the foundations.

The court of appeals affirmed the district court's decision by a divided vote (Pet. App. 1-32). The court recognized that the agreements at issue in this case are agreements among physicians to set maximum fees to be charged to insurers (*id.* at 2). It also recognized that maximum price fixing in a vertical context would be illegal per se under this Court's decisions (*id.* at 7 n.4). Since the present agreements were among direct competitors, however, the court of appeals declined to apply this Court's decisions condemning maximum price agreements. The court of appeals also declined to classify the conduct at issue as illegal per se because of the "professional" nature of the services provided by the defendants (*id.* at 5-6), and because "a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law" (*id.* at 12). Finally, the court stated that the "record reveals nothing about the actual competitive effects of the challenged arrangement" (*id.* at 5).

Judge Larson dissented. He concluded that the agreements in question in this case are the type of "naked price restraint" previously held by this Court to be per se illegal. He observed that nothing in the nature of the medical profession or the health care industry warrants an exception from per se rules for price fixing (Pet. App. 19-27). Judge Larson also concluded that "[e]ven if this were the first judicial examination of this form of restraint, its anticompetitive vices are egregious and its procompetitive features nonexistent, so that this Court could declare it to be within the per se rules" (*id.* at 27).[5]

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[5] Judge Larson added that "even if the rule of reason is the correct standard * * * a detailed economic analysis of the in-

ARGUMENT

1. For the second time in a year, the Ninth Circuit has seriously misconstrued the per se doctrine.[6] Its holding conflicts both with decisions of this Court and with sound economic analysis. It should be reversed.

a. This Court long ago established that an agreement among competitors to fix prices is a per se violation of Section 1 of the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-399 (1927). As the Court has emphasized: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing * * * price * * * is illegal *per se*." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The Court consistently has reaffirmed that an "agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), quoting *United States* v. *Container Corp.*, 393 U.S. 333, 337 (1969). Only last year, this Court, in summarily reversing the court of appeals, stressed that a horizontal agreement to fix prices is "the archetypal example" of conduct unlawful per se under Section 1 of the Sherman Act. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980). In this

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dustry is not necessary. This agreement to fix fees is so plainly anticompetitive that it is an unreasonable restraint of trade on its face" (Pet. App. 31-32).

[6] In *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), this Court summarily reversed a decision of the Ninth Circuit which had held that an agreement among competitors to eliminate free trade credit did not constitute price fixing and consequently was not per se illegal.

case, the district court and court of appeals found that the defendants are competitors who have made agreements with the purpose and effect of setting the price of their services (Pet. App. 2, 39). Thus, their agreements are illegal per se.[7]

b. The court of appeals thought that the agreements at issue here should not be illegal per se because they set maximum rather than minimum prices (Pet. App. 6-9). But this Court never has limited the per se rule to agreements that fix minimum prices. Forty years ago, the Court made it clear that an agreement "for the purpose and with the effect of * * * depressing * * * price * * * is illegal

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[7] Respondents contend that the foundations' use of conversion factors and relative value schedules to arrive at a fixed level of compensation under approved insurance plans is not price fixing because "[a]ll physicians are free to bill as they like" (Br. in Opp. 6). But freedom to "bill" for an amount one has agreed not to collect has no economic significance. Moreover, a fee schedule serves readily as a list of suggested prices for all medical services; such a list, adopted by direct competitors, is a restraint of trade even if it is not binding. *Nationwide Trailer Rental System, Inc.* v. *United States*, 156 F. Supp. 800, 805 (D. Kan.), aff'd, 355 U.S. 10 (1957); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128, 130, 134 (9th Cir. 1960). Finally, we note that the parties to any price fixing agreement are free not to adhere to it, since such agreements are legally unenforceable violations of the Sherman Act. Respondents also argue that their conduct is not price fixing because only foundation member physicians are obligated to accept the agreed-upon compensation from the insurer as full payment for their services (Br. in Opp. 6). But, even if the agreements at issue affected only payments made by foundation-approved insurers to member physicians, the agreements would still be illegal per se. Price fixing agreements are illegal even if they "may not be aimed at complete elimination of price competition." *United States* v. *Socony-Vacuum Oil Co., supra*, 310 U.S. at 225 n.59.

per se." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 223. And in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), the Court held that "agreement[s] among competitors to fix maximum resale prices of their products * * * no less than those to fix minimum prices * * * [are] * * * illegal *per se*." See also *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152-154 (1968).

The court of appeals recognized that a vertical agreement to fix a maximum price is illegal per se, but believed that a horizontal agreement should be treated differently (Pet. App. 7 n.4). In *Kiefer-Stewart*, however, the agreement at issue was horizontal as well as vertical. It was to the maximum prices fixed by horizontal competitors—Seagram and Calvert—that the Court spoke in the passage quoted above. Moreover, in terms of economic analysis, it is illogical to impose a stricter rule for vertical maximum price-fixing agreements than for similar horizontal agreements among direct competitors. If there were to be any distinction between vertical and horizontal maximum price fixing, there is a stronger case for per se treatment in the horizontal context. Vertical restraints sometimes have a potential for procompetitive effects which is absent in similar horizontal agreements (*Continental T.V., Inc* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 51-52, 56-59 & n.28 (1977)), and more detailed analysis may be necessary to determine whether vertical restraints should be held unlawful.

Compelling economic reasons support this Court's holdings that agreements to fix maximum prices are illegal per se. First, the maximum price fixed by agreement may operate as a floor as well as a ceiling. See *Albrecht* v. *Herald Co.*, *supra*, 390 U.S. at

153 ("if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, * * * the scheme tends to acquire all the attributes of an arrangement fixing minimum prices"). That danger is clearly present in this case. Doctors have no financial incentive to charge insured patients less than the maximum fee because insurers, in order to obtain foundation approval, previously have agreed to pay any fee up to that maximum. Moreover, insured patients have no direct financial incentive to select a doctor who charges less. The doctor's charge is paid by the insurer, and an individual patient's insurance premiums do not vary on the basis of the fees charged by a particular doctor.

Second, a collective agreement on pricing aggregates sellers' power in a way that is injurious to buyers. Even if it might have the short-run effect of containing cost increases, such an aggregation of the market power of doctors as sellers of medical services can do nothing to alleviate the more general problem of subnormal competition in the health care industry. This Court repeatedly has rejected the argument, apparently accepted by the court of appeals, that price fixing may be lawful if it holds the cost of goods or services at a reasonable level (Pet. App. 6). Because price fixing repeatedly has been found to be anticompetitive, "[i]t is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc.* v. *Target Sales, Inc.*, *supra*, 446 U.S. at 647; *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 397-398; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-341 (1897); *United States* v. *Socony-Vacuum Oil Co.*, *supra*.

Indeed, the agreements at issue here serve to inhibit unilateral actions by insurers to restrain costs

through prescription of their own maximum payments to physicians. See generally *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 209-210 & n.5 (1979). When competing physicians do not set prices, insurers have an economic incentive to negotiate fee schedules that will minimize costs for medical services rendered to their subscribers, for they maximize their own profits by doing so. And when there is competition or potential competition among insurers to minimize medical payments, the benefits of their actions accrue to the public. Insurers who succeed in limiting their costs are able to offer lower premiums than insurers who do not, and those who offer lower premiums for similar benefits have a competitive advantage in attracting and retaining subscribers.

When all insurers are faced with a single price schedule fixed by doctors through foundations, however, competition among insurers has a much more limited potential for minimizing consumer costs. Efforts by doctors to fix insurer costs deprive insurers and physicians alike of their power to make independent decisions that are the hallmark of a competitive market system. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, *supra*, 340 U.S. at 213; L. Sullivan, *Antitrust* § 78 at 210-212 (1977).

Third, a maximum price agreement may effectively impede new entry. L. Sullivan, *supra*, § 78 at 211. In contrast to individual insurers, who have a financial incentive to set doctors' fees at as low a level as possible in order to reduce premium costs and thereby maximize their own profits, competing doctors have a financial incentive to limit their fees by agreement only if that would impede new entry. While the agreements at issue in this case might not impede entry into the medical profession as such, they could

be used as devices to impede entry by competing systems of prepaid health care, such as health maintenance organizations ("HMOs"),[8] or to forestall the development of other types of health care systems deemed undesirable by physicians operating under currently prevailing methods.

c. This court's decision in *Broadcast Music Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-23 (1979), relied on by respondents, does not require a rule of reason analysis in this case. Neither the district court nor the court of appeals, after extensive briefing, identified any ground for inferring that maximum price fixing by competing physicians serves a procompetitive purpose.[9] And possible beneficial

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[8] See note 9 *infra*; see also Havighurst, *Health Maintenance Organizations and the Health Planner*, 1978 Utah L. Rev. 123, 129-130, 132-134.

[9] The agreements at issue in this case differ fundamentally from the kinds of agreements that facilitate the operation of health maintenance organizations (HMOs). The member physicians of the defendant foundations practice as separate economic entities who have not integrated their medical practices, entered into any risk-sharing arrangements, or taken other steps that might warrant joint venture analysis under the rule of reason. By contrast, the Health Maintenance Organization Act of 1973, 42 U.S.C. 300e *et seq.*, provides that, in a health maintenance organization, a group of physicians and other health professionals may provide coordinated and integrated comprehensive medical services to subscribers for a periodic fee, and that physicians and others in the HMO must share income (from subscriber fees) and expenses according to predetermined employment or partnership agreements under which the physicians are at risk for any adverse financial results of the HMO. Thus, agreements about the fees to be charged subscribers and the salaries or partnership shares to be paid to physicians and others who provide services through an HMO, like similar agreements among

effects that are not procompetitive are not cognizable under the rule of reason. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691-692, 693-694 (1978).

The inability of respondents and the lower courts to identify any procompetitive effect stemming from maximum price fixing is not surprising. Medical cost containment and the offering of a competitively priced health insurance plan simply do not require price fixing agreements among competitors. Insurers can, and regularly do, establish their own maximum payments to physicians who provide medical services to insured patients. See generally *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 209-210 & n.5 (1979); see also the brief amicus curiae filed by the United States in the *Royal Drug Co.* case (77-952 Br. 10-13). Indeed, the Maricopa Foundation itself has a contract with the State of Arizona to administer the Comprehensive Medical Dental Program for Foster Children, a program in which maximum payments to physicians are set by a state agency —not by competing doctors (Br. in Opp. 7).

Nor do the other functions performed by the foundation require price fixing agreements. The foundations review the medical necessity and appropriateness of treatment given to insured patients and, for some groups, the necessity and appropriateness of hospital utilization (Pet. App. 3; Br. in Opp. 4). For some insured groups the foundations also serve as agents for underwriters to facilitate claims payments to doctors (Pet. App. 3; Br. in Opp. 4).

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individuals who form a partnership or corporation, may be essential to render the service provided by the HMO. *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.).

There is no suggestion, even by respondents, that performance of either of these functions requires agreements on price.

Thus, whatever may be the proper approach to other agreements in the health care field, respondents have failed to advance any acceptable ground for examining their price fixing agreements under the rule of reason or for undertaking a more thorough review to determine whether the rule of reason should be applied. They have offered no explanation why their price fixing activities are essential to the competitive functioning of the health care market, and have offered no reason for departing from this Court's decisions in *Kiefer-Stewart* and *Socony-Vacuum*.

d. Deficiencies in competition in the health care industry perceived by the court of appeals (Pet. App. 6) do not justify private restraints that eliminate or undermine such competition as there is. If market forces do not result in a socially acceptable level of price or supply of particular goods or services, state and federal legislatures may regulate the competitive process. See, *e.g.*, The National Health Planning and Resources Development Act of 1974, 42 U.S.C. (Supp. III) 300k-1, 300m-2, 300m-6 and 300n-1(b) (certificate of need program requiring state agency approval of new competitive entry by health care providers). But it is solely the province of the legislatures, not private groups, to advance social values by superseding price competition. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 695-696; see also *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248 (1951); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 467-468 (1941).

2. The court of appeals' decision also conflicts with this Court's decisions holding that an agreement

among competitors fixing prices is not exempt from per se treatment merely because the parties to the agreement are professionals. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978). While the decisions in *Goldfarb* and *Professional Engineers* do not resolve the legality of all types of collective conduct by professionals, they clearly recognize that price fixing by lawyers and engineers is per se unlawful. The agreements at issue in this case have no purpose other than fixing prices. And nothing about the medical profession distinguishes it from the legal and engineering professions in any respect relevant to the applicability of the per se rule against price fixing.

3. The court of appeals' decision merits correction now. By confusing the law applicable to price fixing, the decision saddles trial courts with the very kind of protracted factual inquiry that this Court rejected when it adopted the per se rule in *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 398. Moreover, the adverse effects go beyond burdening the courts. The court of appeals' decision deprives health professionals, insurers, and enforcement authorities of the clear standard that the per se rule is intended to supply. *Ibid.* It impedes the efforts of the Department of Justice and the Federal Trade Commission to stop price fixing by professionals[10] and to insure that prepaid medical and legal pro-

[10] See, *e.g.*, *National Society of Professional Engineers* v. *United States*, *supra*; *United States* v. *Geneva County Bar Ass'n*, Civ. No. 80-113-S (M.D. Ala.) (amended complaint filed Dec. 9, 1980); *United States* v. *McAliley*, Civ. No. 80-111-S (M.D. Ala.) (complaint filed Dec. 9, 1980); *United States* v. *Cassady, Fuller & Marsh*, Civ. No. 80-110-S (M.D. Ala.) (complaint filed Dec. 9, 1980).

grams are structured so that they neither authorize nor facilitate such price fixing. The adverse effect of the decision of the court of appeals on the law of price fixing is magnified by the fact that it occurs in the vast and growing health care industry and the likelihood that it will be applied to economically significant markets involving other professional services as well.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.[12]

Respectfully submitted.

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[11] The health services industry employs more than five million persons (U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings, September 1980* at 57). Annual national health care expenditures now total more than $200 billion (*Projections of National Health Expenditures, Health Care Financing Review* 1, 11 (Winter 1980); see also S. Rep. No. 93-129, 93d Cong., 1st Sess. 8 (1973)).

[12] The Court may wish to consider summary reversal. See *Catalano, Inc.* v. *Target Sales, Inc., supra.*

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